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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSE JUAN RAMIREZ, Defendant and Appellant.	C044744 (Super. Ct. No. 02F04071)

Defendant Jose Juan Ramirez, convicted of robbery, assault with a deadly weapon, two counts of carjacking, and one count of evading a pursuing peace officer, argues his attorney was ineffective for failing to investigate or introduce exculpatory evidence with respect to two of the counts filed against him. For the reasons stated below, we conclude that counsel was not ineffective and defendant was not prejudiced by counsel's actions. Accordingly, we affirm the judgment.

FACTS AND PROCEEDINGS

Hutcherson Carjacking

Paul Hutcherson went to Harlows, a bar located on 27th and J Streets in Sacramento, at about 11:30 p.m. on the night of May 7, 2002, where he stayed for approximately one hour before leaving. As he approached his Ford Expedition, Hutcherson pressed the keyless remote control and unlocked the doors. A moment later, defendant stepped from behind the vehicle, "[r]acked a slide" on what appeared to be a black nine-millimeter handgun and ordered Hutcherson to drop the keys. After Hutcherson complied, defendant picked up the keys, started the Expedition, and drove away. Hutcherson called 911 and reported the carjacking, and he later described defendant and the gun to law enforcement authorities.

The following day, at approximately 1:30 p.m., a City of Sacramento code enforcement officer noticed defendant acting suspiciously at a tire store, and decided to undertake a license plate check of the Ford Expedition defendant was driving. That inquiry disclosed the car had been carjacked from Hutcherson. The officer notified police, who arrested defendant. A loaded gun bearing defendant's fingerprints and matching the description of the one used in the carjacking was found in the Expedition. Two days after the carjacking, Hutcherson identified defendant in a lineup after considering his choice for only a few seconds.

Defendant was released from custody from the Sacramento County Jail on May 11, 2002, after posting bail, and remained free on bail until his arrest on May 30, 2002.

Silvetre Robbery

At 4:00 p.m. on May 15, 2002, Esteban Silvetre cashed a number of checks at a sporting goods store on Northgate Boulevard in Rio Linda so he could pay several employees on his construction crew. When Silvetre returned to his truck, defendant appeared, put a gun to Silvetre's back, and demanded his wallet, which Silvetre handed to defendant. Defendant ran away behind some stores while two of Silvetre's employees gave chase. Silvetre found Thomas Higgins, a Sacramento City police officer who was in the vicinity and told him he had been robbed. Silvetre then joined his employees' pursuit of defendant to Yolanda's Bar into which defendant had fled. The men reported this to Officer Higgins, who radioed for backup.

Officer Higgins later questioned Kenneth Bruno, who had been drinking at the bar. Bruno said he saw defendant run through the bar and out the back door. Bruno told Higgins defendant lived with his mother and gave the officer the mother's name and address. Bruno gave a different account while testifying, stating that he merely saw defendant walk into the bar and go towards the back. Higgins later spoke with defendant's mother who said defendant lived with her.

Silvetre and one of his employees picked defendant out of a photo line-up about two hours after the robbery.

Skutley Carjacking/Parkhurst Assault/Evading Pursuing Officers

On May 29, 2002, between 5:00 p.m. and 6:00 p.m., Joseph Skutley drove his coworker, Lon Parkhurst, to the Pep Boys on Arden Way in Sacramento to get parts for Parkhurst's truck. Skutley stayed in his truck--a black Ford F150--while Parkhurst went into the store. As Skutley was stretched out in the passenger seat, defendant tapped on the window and asked for a cigarette. Skutley said he did not smoke and defendant walked away.

Once Skutley saw Parkhurst in the checkout line, he returned to the driver's seat of the truck and was again approached by defendant, this time holding a black revolver. When defendant ordered Skutley out of the truck, Skutley ran into the store and told Parkhurst that he had been carjacked. Without saying a word, Parkhurst ran out of the store, jumped onto the hood of the Ford, rolled over the top of the cab, and fell into the bed of the truck. As he passed over the cab, defendant fired a shot through the roof, just missing Parkhurst. Parkhurst jumped out of the truck bed and ran to safety while defendant struggled with the emergency brake of the truck. When Parkhurst then attempted to remove his tools from the truck bed, defendant pointed his gun at him and asked if he wanted to die. Parkhurst retreated and defendant drove away.

Sheriff's deputies recovered Skutley's truck approximately eight hours later, following a high speed chase. The deputies noticed the truck because it was being driven with its

headlights off and it matched the description of Skutley's truck. As they approached the truck to check its license plate, defendant sped away, running several stop signs before crashing into a fence.

The authorities called Skutley and told him his truck had been recovered, but it was totaled and a number of items of personal property were missing, including his tools, wallet, checkbook, a bank card, a retail credit card, and the stereo and speakers.

The following morning, Skutley picked defendant out of a photographic lineup, stating he was a "[h]undred ten percent" sure he identified the carjacker.

Defendant was charged with two counts of carjacking (Pen. Code, § 215, subd. (a)--counts one and three; further undesignated statutory references are to the Penal Code) based on the Hutcherson and Skutley carjackings, one count of second degree robbery (§ 211--count two) based on the Silvetre robbery, one count of assault with a deadly weapon (§ 245, subd. (a)(2)--count four) based on the Parkhurst assault, and one count of evading a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)--count five) based on defendant's attempted escape with Skutley's truck. The information alleged that defendant personally used a firearm (§ 12022.53, subd. (b)) with respect to counts one and two, intentionally and personally discharged a firearm (§ 12022.53, subd. (c)) with respect to count three, personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)) with respect to count four, and committed the

offenses alleged in counts two through five while released from custody on bail (§ 12022.1).

The jury returned guilty verdicts on all counts and found the enhancement allegations were true. The court sentenced defendant to an aggregate prison term of 36 years 4 months.

DISCUSSION

Defendant argues trial counsel was ineffective because he did not investigate or present evidence that would have shown that a third party committed the Skutley carjacking and Parkhurst assault. Because the record is inadequate to support the argument, we disagree.

During cross-examination of Skutley and Danny Minter (one of the detectives assigned to the Skutley carjacking), defendant's trial counsel sought to elicit testimony that Skutley had been contacted by the California Highway Patrol (CHP) several days after the carjacking; CHP had informed Skutley that it had recovered several items of Skutley's personal property from a third party; the recovery was made in connection with the theft of an unrelated vehicle; Skutley told Minter about the CHP contact; and, as a result, Minter contacted CHP.

The prosecutor objected to this line of questioning on relevance, hearsay, and foundational grounds. Defendant's trial counsel argued that the questions were admissible to show the state of mind of Minter, who thought the information at least warranted further investigation. The court sustained the

objection during the cross-examination of Skutley, and trial counsel withdrew the question on cross-examination of Minter.

Defendant does not contend that the exclusion of the evidence was improper. Instead, he focuses on trial counsel's failure to investigate or introduce evidence pertaining to the recovery of Skutley's property from the third party. In defendant's view, the Skutley carjacking and Parkhurst assault charges hinged on Skutley's identification, and the absence of evidence that a third party perpetrated these offenses was prejudicial.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that a determination more favorable to defendant would have resulted but for counsel's unprofessional errors. (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) In reviewing a claim of ineffective assistance on appeal, we accord great deference to trial counsel's tactical decisions. (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070.) Thus, "a reviewing court will reverse a conviction . . . 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.) "'If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply

could be no satisfactory explanation." [Citation.]' [Citation.]" (*People v. Hart* (1999) 74 Cal.App.4th 479, 486.)

Applying these standards, we conclude defendant has failed to establish either that defense counsel's representation fell below an objective standard of reasonableness, or that there is a reasonable probability of a result more favorable to defendant if such an investigation had been undertaken.

To begin with, the record does not disclose that trial counsel failed to investigate the recovery of Skutley's property from the third party. Defendant's argument assumes that there was no investigation, a fact he apparently infers from trial counsel's attempts to elicit testimony from Skutley and Minter regarding recovery of the property from the third party. An inference of failure to investigate is not, however, the only reasonable one to be drawn from the questions. Since the record shows that trial counsel had long been aware of the recovery of Skutley's property from the third party, it is equally likely that he investigated the circumstances of the recovery, and discovered the evidence *implicated* rather than exonerated defendant. For instance, trial counsel's investigation may have disclosed that the third party received the stolen property directly from defendant during the eight hours he had Skutley's truck. If that were the case, trial counsel hardly could be considered ineffective for failing to adduce such evidence from competent witnesses. Counsel could have decided to elicit evidence of the third party's involvement from witnesses who would be unable to provide additional details incriminating to

his client. The stated purpose of the questions--to show Minter's state of mind in conducting a follow-up investigation--avoided eliciting any details of the third party's involvement. These facts give rise to an equal inference that trial counsel investigated the third party's involvement and made a tactical decision to try to suggest that person's involvement through questions he put to Minter and Skutley. By doing so he could avoid the details of the recovery of Skutley's personal property, at the same time injecting an element of doubt into the jury's deliberations.

Where, as here, the record contains no explanation for trial counsel's behavior, we must reject a claim of ineffective assistance unless trial counsel was asked for and did not provide an explanation for his behavior or there simply is no satisfactory explanation. (*People v. Hart, supra,* 74 Cal.App.4th at p. 486.) Since trial counsel was not asked to explain his conduct and there exists a satisfactory explanation for that conduct, defendant's ineffective assistance of counsel claim fails.

But even if trial counsel conducted no investigation regarding the third party's involvement, and was thereby ineffective, defendant has failed to establish a reasonable probability that he would have received a more favorable outcome. Skutley was certain of his identification of defendant from a photographic lineup after the carjacking; defendant was driving the truck a mere eight hours after the crime; and he desperately attempted to elude pursuing officers. The modus

operandi in the Skutley carjacking--surprising the victim at gunpoint while he was preparing to depart--was similar to the modus operandi in the Hutcherson carjacking and Silvetre robbery, where the evidence of guilt was convincing.

Since defendant has failed to show either that trial counsel was ineffective or that he was prejudiced, his appeal cannot be sustained.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

DAVIS, Acting P.J.

ROBIE, J.